IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1104 OF 2006.

Anusayabai Dattoba Nalawade. ... Appellant.
Versus.
Ramanand @ Hanuman Bhakta Mandal
and others. ... Respondents.

Shri P.R.Arjunwadkar for the Appellant.

CORAM : ABHAY S.OKA, J.

DATED : 12th December, 2007.

P.C.:

1. Heard the Advocate appearing for the Appellant. The 1st Respondent made an application before the trial Court under section 278 of the Indian Succession Act, 1925 (hereinafter referred to as "the said Act") for grant of Letters of Administration with will annexed in respect of the last Will and Testament dated 2nd July 2001 executed by deceased Dattoba Nalavade. The present Appellant is the widow of the deceased who raised objection to the grant of Letters of Administration by disputing the execution of the will and by raising several grounds of objections. Therefore, the Application filed by the 1st Respondent was treated as a suit and the parties were permitted to lead evidence. The trial Court allowed the Application by granting Letters of Administration in favour of the 1st Respondent. In an Appeal preferred by the Appellant, the order of the trial Court has been confirmed.

2. The first submission of the learned Advocate for the Appellant is that the Trustees and the office bearers of the 1st Respondent Trust have admittedly played major role in getting the alleged Will executed from the deceased. He submitted that there are number of suspicious circumstances which are not explained by the 1st Respondent especially when under the alleged Will the deceased has purported to dis-inherit his all the legal representatives. He submitted that the circumstances leading to the alleged execution of the will are unnatural and suspicious which are not at all explained by the 1st Respondent who was propounding the Will. The second submission is that in view of the fact that the proceedings filed by the 1st Respondent was covered by clauses (a), (d), and (p) of section 50 of the Bombay Public Trusts Act, 1950 (hereinafter referred to as "the said Act of 1950"), the proceedings filed by the 1st Respondent was not maintainable as prior consent of the Charity Commissioner as required by section 51 of the said Act of 1950 was admittedly not obtained. His third submission is that the application for grant of Letters of Administration has been filed only by one of the Trustees and all the Trustees of the said Trust were necessary and proper parties. Lastly he submitted that admittedly a public notice was published on 28th January 2002 by the deceased through his Advocate in which the

deceased has stated that he had revoked all his earlier wills. He submits that the 1st Respondent did not dispute the fact of publication of the said public notice and therefore, the will stands revoked.

3. I have considered the submissions. Insofar as the first submission canvassed by the learned Advocate appearing for the Appellant is concerned, I find that the learned trial Judge has scrutinised and discussed the entire oral and documentary evidence on record and has recorded a finding of fact that the execution of the said Will by the deceased with free consent has been established. The Judgment of the Appellate Court shows that the said Court has considered the findings recorded by the trial Court and material on record and has expressed an agreement with the view taken by the trial Court.

4. According to the said will the bequest of the estate has been made by the deceased in favour of the 1st Respondent Trust. Even assuming that the office bearers or the Trustees of the said Trust had participated in the process of execution and registration of the Will, that by itself is no ground to hold that the execution of the will is suspicious. A perusal of paragraph 4 of the Judgment of the trial Court shows that the learned trial Judge was conscious

of the settled principles of law regarding the burden and onus of proof in the matter of proof of execution of the Will. The trial Court on the basis of evidence on record observed that the deceased had devoted his life towards spirituality. In fact the trial Court noted that an application for maintenance was filed by his wife and the same was rejected on the ground that the deceased was living a spiritual life and was not having any income of his own. The trial Court recorded a finding that the deceased had withdrawn from the society and the deceased was a member of the 1st Respondent-Trust. Insofar as the execution of the will is concerned, the same has been duly proved. The Courts below, especially the trial Court has referred to the evidence of Dr.Satish Keshgonda Patil regarding the condition of the health of the deceased. Thus insofar as the execution of the Will and the existence of alleged suspicious circumstances are concerned, there are concurrent findings of facts recorded by both the Courts below which are based on appreciation of oral and documentary evidence on record and no interference can be made with the said findings in the Second Appeal.

5. Now coming to the second submission of the learned Advocate for the Appellant, it must be noted that it is a well settled principle of law that in the proceedings for grant of Probate or Letters of

Administration with Will annexed, the issue of title of the testator as regards the property affected by the Will can never be decided. The order passed in the proceedings operates in rem insofar as the proof of execution of the Will is concerned. The proceedings filed by the 1st Respondent is not a suit though by legal fiction in view of the objections raised to the grant of letters of administration, the procedure contemplated for deciding a suit is required to be followed. The learned Advocate for the Appellant has relied upon clause (a) of section 50 of the said Act of 1950 which deals with a decree for recovery of possession of the property or proceeds thereof. Clause (d) deals with vesting any property in a trustee and clause (p) deals with the decree of declaration of any right in favour of or against a public trust or trustees thereof. Considering the nature of the proceedings under section 278 of the said Act of 1925 none of the clauses in section 50 of the said Act of 1950 will have any application.

6. Insofar as the third submission is concerned, it is not a case that the President of the 1st Respondent-Trust who filed the application was not authorised by the Trust to file the Application. By no stretch of imagination, it can be said that the application could be lawfully filed only if all the

Trustees are the Applicants. There is no dispute about the authority of the President to file application on behalf of the Trust. Therefore, there is no merit in the third submission.

7. Insofar as the fourth submission is concerned, the public notice published by the Advocate for the deceased recites that the earlier wills made by the deceased are revoked. However, the revocation of unprivileged will is governed by section 70 of the said Act of 1925. Section 70 reads thus:

> "70. Revocation of unprivileged Will or codicil. - No unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged ill is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same."

In the present case reliance is sought to be placed on a public notice declaring the intention of the testator to

revoke the will. The law requires that the revocation shall be made by writing in the manner in which an unprivileged will is required to be executed. Under section 63 of the said Act of 1925, an unprivileged will requires attestation by two or more witnesses. The writing relied upon by the Appellant is not at all attested by any witness.

7. At this stage the learned Advocate for the Appellant invited my attention to paragraph 19 of the decision of the Appellate Court. The settled legal position as mentioned above is that in a proceeding for grant of Letters of Administration or Probate, the issue regarding title of the property affected by the Will cannot be decided. Therefore, even assuming that there is some observation made in the judgment regarding issue of title, it is obvious that the same will not bind the concerned parties.

8. In view of the aforesaid discussion, there is no merit in the Second Appeal and the same is dismissed with no order as to costs.

Judge.